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LIGHT, LESS-FILLING, IT'S BLUE-RIBBON!

Stephen F. Ross*

For well over a century, the claimed desire of baseball owners to maintain competitive balance has been a bugaboo used to justify any number of restraints of trade that would be plainly illegal in most American industries. For much of the sport's history, observers might well see the claims as entirely pretext—witness the New York Yankees' complete domination of the American League during the middle part of the Twentieth Century,¹ the combination of a rigid reserve clause with free cash sales of players to wealthy teams before World War II,² and the clubs' refusal to permit a return to historic revenue sharing of gate receipts until recent years,³ to cite a few examples.

Recent efforts, however, cannot be explained entirely by a desire to restrict trade. In 1995, owners agreed to a significant sharing of revenue;⁴ in 2000, the Major League Constitution was amended to specify that the Commissioner's historic and broad powers to protect the "integrity of the national game of Baseball" included the public perception that "there is an appropriate level of long-term competitive balance among the clubs."⁵ Most

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¹ In the eighteen year period from 1947-64, the Yankees were the American League champions on fourteen occasions. See *THE BASEBALL ENCYCLOPEDIA* 2886-2903 (10th ed. 1996).

² See, e.g., LEONARD KOPPETT, *KOPPETT'S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL* 177-78 (1998) (illustrating point with inability of financially ailing Philadelphia A's to compete).

³ See JOHN HELYAR, *LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL* 523-25 (1994).

⁴ The formula was incorporated in the collective bargaining agreement ending the 1994-95 player's strike. See Basic Agreement between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association, reprinted in Jeffrey S. Moorad, *Negotiating for the Professional Baseball Player*, in 1 *LAW OF PROF. & AMATEUR SPORTS*, at app. 5A (West 1997).

⁵ MLB CONST., art. II, § 4. See Ross Newhan, *In Bud They Trust*, L.A. TIMES, Jan.

relevant to this paper, Commissioner Bud Selig also formed a Blue Ribbon Panel on Baseball Economics to “study whether revenue disparities among clubs are seriously damaging competitive balance” and to “recommend structural reforms to alleviate the problem.”⁶

The Panel’s Report represents an important and constructive development in the continuing public conversation about our National Pastime. A review suggests, unfortunately, that the men of substance who drafted the report—Yale President Richard C. Levin, former U.S. Senate Majority Leader George J. Mitchell, former Federal Reserve Board Chairman Paul Volcker, and noted syndicated columnist and baseball author George F. Will—appear both conflicted and somewhat biased as to their mission. Should they be aspirational in establishing a blueprint for how the game should be reformed? Or, instead, should they limit themselves to modest suggestions that might be accepted, or that might meet the predisposition of their Panel’s creator, Commissioner Selig? While the Report calls for a massive increase in revenue sharing, poor teams are simply “encouraged” to boost payroll expenditures to make themselves competitive. A punitive payroll tax unlikely to attract union support is included without a sound theoretical basis for how such a tax will improve competitive balance. Proposed changes in draft rules severely damage the interests of amateur players, but rules that might hurt current owners are not even considered.

This Commentary reviews the recommendations of the Blue Ribbon Panel and, accepting the Report’s perspective of advocating the long-term interests of baseball fans,⁷ identifies some important and positive contributions made by the Report. Next, some significant flaws and shortcomings are discussed. Finally, the Commentary suggests several practical reforms likely to improve competitive balance which plausibly could secure the support of the various constituencies of the National Pastime.

I. THE REPORT, AND ITS STRENGTHS

The rhetoric of the Report from beginning to end is focused on competitive balance, which is defined as a structure that

26, 2000, at D1.

⁶ RICHARD C. LEVIN ET AL., *THE REPORT OF THE INDEPENDENT MEMBERS OF THE COMMISSIONER’S BLUE RIBBON PANEL ON BASEBALL ECONOMICS 1* (2000), available at http://www.mlb.com/mlb/downloads/blue_ribbon.pdf [hereinafter REPORT].

⁷ See *id.* at 13.

permits every well-run club to have “a regularly recurring reasonable hope of reaching post-season play” (“RRRRPP”).⁸ The Report acknowledges—contrary to the protestations of owners over the years—that the dramatic introduction of competition for players’ services (free agency) resulting from the *Messersmith/McNally* arbitration in 1976 actually improved competitive balance in baseball.⁹ However, the Report suggests that since the 1994 strike, competitive balance has markedly declined, a decline that the Report attributes to the increased payroll disparities between the clubs. By comparing payroll disparities before and after 1994, the Report infers that competitive balance can be maintained with a 2:1 ratio of expenditures between the highest quartile of clubs and the lowest quartile, but that the current 3:1 ratio results in dramatic imbalance. It attributes this imbalance in turn to “a large and growing” disparity in local revenues, and then relates its specific recommendations back to a goal of re-establishing a 2:1 ratio of expenditures between the big-spending and most frugal clubs.¹⁰

To facilitate the goal of permitting every well-run team to have a RRRRPP, the Report makes six specific recommendations:

1. Clubs should share 40-50 percent of local revenue;¹¹
2. Payrolls in excess of \$84 million (the figure will *not* increase with inflation) are taxed at the marginal rate of 50 percent, while all clubs are “encouraged” to spend at least \$40 million;¹²
3. Revenues gained through league-wide activities (network television contracts, licensing, internet, etc.) should be unequally distributed “progressively” to help poorer clubs, but conditioned on the clubs spending at least \$40 million;¹³

⁸ *Id.* at 8. This is a great alliteration. It will remind antitrust cognoscenti of the Department of Justice’s merger analysis terminology for the focus, in market definition, on whether a firm could profitably impose a “small but significant and non-transitory increase in price.” FEDERAL TRADE COMMISSION, 1992 HORIZONTAL MERGER GUIDELINES, available at <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited Aug. 2, 2002). This became known as a “SSNIP”. Competitive balance can henceforth be tested by whether there is a RRRRPP (pronounced as “r-r-r-r-ipp” with a trilled r).

⁹ *In re Twelve Clubs Comprising Nat’l League of Prof’l Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) 101 (Dec. 23, 1975), an arbitrator interpreted the uniform player contract that had been negotiated between the owners and the players’ union to permit all players to become free agents after a single additional “option” year of service with their contracted-for team. This decision resulted in a new collective bargaining agreement permitting unrestricted bidding for the services of all players with more than six years of major league service. See MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE SPORT AND BUSINESS OF BASEBALL 238-85 (1991).

¹⁰ See REPORT, *supra* note 6, at 6-7.

¹¹ *Id.* at 8.

¹² *Id.*

¹³ *Id.* at 9.

4. The Rule 5 draft—which allows clubs, for a modest sum, to draft players not protected by being placed on other clubs' forty-man expanded Major League roster but requires the drafting team to keep the player on its own twenty-five-man roster for the next season—would be modified so that the weakest eight clubs would not have to keep a drafted player on their roster;¹⁴

5. The Rule 4 amateur draft would be modified to cover all international players (only North American and Puerto Rican players are now subject to the draft), give more picks to systematically poor clubs, and to allow the trading of draft picks;¹⁵ and

6. MLB policy should expressly permit franchises to relocate if they cannot obtain a new ballpark (impliedly with significant public subsidization).¹⁶

The Report represents a major contribution to the public discussion of our National Pastime. Such a discussion is critical for a number of reasons. Although the failure of Congress to overturn baseball's judicially-created antitrust exemption cannot today be attributed to "positive inaction" on the part of the legislature,¹⁷ the degree to which fans are unsatisfied with the conduct of baseball owners can re-open the possibility of legislative reconsideration of the exemption.¹⁸ Similarly, as has been documented elsewhere,¹⁹ the Supreme Court's jurisprudence regarding its own reconsideration of precedents suggests that evidence that a prior ruling is "inconsistent with social welfare" could support creation of new legal doctrine. If an enlightened public debate resulted in widespread public awareness and support for, or opposition to, baseball practices, this could influence the Justices as well. More imminently, public perception has a indirect effect on the short-

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 10.

¹⁷ See Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. L. REV. 133, 161 & n.90 (2001).

¹⁸ The Report justifies the exemption as founded on the notion that it is in the public's interest to have MLB as a national enterprise with orderly operations and a reasonable degree of cooperation among the clubs, even if that cooperation is not strictly in compliance with the pro-competitive policies that underlie the antitrust laws. See REPORT, *supra* note 6, at 37. Because the Report's discussion of the exemption is an aside, and among the drafters only Senator Mitchell is legally trained, perhaps the drafters can be excused from their complete failure to identify a single aspect of cooperation among baseball clubs that is both in the public interest and not "strictly in compliance" with a current interpretation of the antitrust laws.

¹⁹ See Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 MIAMI J. SPORTS & ENT. L. 169 (1995).

term future of baseball in the context of the pending labor negotiations between the clubs and the Major League Baseball Players Association: when the public supports management, owners typically remain more resolute, while public opposition to owners' tactics often softens their resolve and lessens the chance of industrial warfare. Finally, even if there was no direct utilitarian value to an intelligent public discussion of the problems facing baseball, it *is*, after all, the National Pastime, and accordingly, the Report's stimulation of discussion represents a net contribution to the public welfare.

The second major contribution of the Report is its specific and clear focus on competitive balance. Owners have often obscured and conflated competitive balance with other goals that are less likely to be attractive to the public and less likely to be recognized by antitrust courts as legitimate.²⁰ The Report also provides a clear benchmark—the RRRRPP concept discussed above—as a measure of competitive balance. The Report accurately identifies RRRRPP as the appropriate measure of competitive balance. With disparate fan bases, and the general national interest in creating dynasties to be maintained or brought down, baseball fans would not prefer that each team, over a thirty-year period, would win the World Series once and have a long-term record of .500.²¹ Although the optimal level of balance remains elusive, the focus on “regularly recurring,” rather than equal, participation in post-season play seems sensible. The RRRRPP, which has its roots in antitrust jurisprudence,²² is likewise superior to various statistical tests that academics often use to measure competitive balance by focusing on the standard deviation among clubs' winning percentages. The RRRRPP correctly focuses on the need to maintain the interest of fans, so that their favorite team is either a contender or so the famous “Wait Until Next Year” headline is a realistic hope. It therefore provides a coherent benchmark by which to evaluate various proposals that result in trade restraints but which are justified in some nebulous way as promoting competitive balance.

²⁰ In the past, owners have sought to create “cost certainty” as well as promote competitive balance. See Bruce Balestier, *Affectionate Distrust Marked Drafting of NBA Settlement*, N.Y.L.J., Feb. 5, 1999, at 1, 8 (reporting that the league's goal for the bargaining was “cost certainty”); Alan Truex, *Owners Less Than Captivated: Players' Proposal Lacks Cost Certainty*, HOUSTON CHRON., Dec. 11, 1994, at 21.

²¹ This point was made at the symposium by players' union counsel Eugene Orza. For a succinct debate, see *Scorecard*, SPORTS ILLUSTRATED, June 25, 2001, at 31.

²² See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 486 (E.D. Pa. 1972) (Higginbotham, J.) (stating that competitive balance occurs when “each team has the opportunity of becoming a contender over a reasonable cycle of years and a reasonable chance of beating any other team on any given night”).

Third, the Report's recommendation of up to a 50 percent split of local revenues recognizes the current unfair distribution of local television rights. Legal precedent vests the right to telecast sporting events in the home team.²³ The clubs have agreed, however, that the visiting team may broadcast games back to its home market, and that each club's home market is protected from outside competition. In other words, the joint exhibition of a Yankees-Twins game from the Humphrey Metrodome in Minneapolis may be broadcast back to New York by the Yankees, who recoup lucrative cable rights fees; in return, the Twins receive the right to broadcast a similar game from Yankee Stadium back to the Twin Cities. If this were negotiated as a bilateral barter deal, the Twins' lawyer would be liable for malpractice. A scheme whereby half of all local broadcast revenues was shared among all members of the league will therefore not only increase the financial viability of small market teams but is simply more fair.

The imprimatur of the Report is important for this principle because, absent a legal challenge to the current scheme,²⁴ any changes in revenue sharing will require the voluntary agreement of the owners or an extraordinary edict by the Commissioner under his newly granted powers. Small-market teams used to have some leverage in this regard, for the agreement granting television rights to the visiting team was simply contractual; however, in return for the modest revenue sharing currently provided, small-market teams agreed to put this unfair barter-agreement in the MLB Constitution.²⁵

Part II of this Commentary details the conceptual and practical flaws in the Report's *specific* recommendation that clubs be encouraged to maintain a minimum payroll of \$40 million and

²³ See, e.g., *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938).

²⁴ For a discussion of a potential antitrust challenge to exclusive territories enjoyed by large market teams, see Ross, *supra* note 17. For a discussion of a legislative proposal by the Seattle Mariners' home-state senator to require revenue sharing, see 137 CONG. REC. S13332 (daily ed. Sep. 19, 1991).

²⁵ MLB CONST., art. IX, § 3. Why small-market owners behave as if they lack significant bargaining power is unclear. In more competitive markets—college football is an example—the wealthier or more successful programs can credibly threaten to re-form conferences limited to top programs, because the economic rents that can be obtained by these successful programs are simply based on brand loyalty. Large-market baseball owners, whose economic rents are based both on brand loyalty and monopoly power, would be at much greater risk if they re-formed a new baseball league limited to clubs in the big cities. Such a league would certainly be viable in a competitive market, but it is doubtful it could remain as the dominant league. It would immediately face a rival league composed of all the small-market teams plus expansion franchises in the major media markets. There is certainly room for an additional viable team in markets like New York and Los Angeles, while there is no such room in Seattle and Minnesota.

be severely taxed on payrolls exceeding \$84 million. However, the *general* objective of devising a plan that increases the payrolls of weaker teams and dampens the payrolls of successful teams is a legitimate one. The fourth important contribution of the Report lies in its astute observation that a well-designed plan will not necessarily result in an aggregate decrease in money devoted to player compensation. The Report notes that a plan that imposes a "competitive balance tax" on certain clubs with higher payrolls and induces all clubs to maintain a minimum payroll will likely cause the clubs with the lowest payroll to increase their expenditures, while clubs in the middle "would be tempted to increase payroll because they would have a greater chance to compete with the high-payroll clubs."²⁶ Indeed, the Report's insights demonstrate that a plan could be designed to improve competitive balance and result in an overall increase in player payroll.²⁷ This is a promising insight, for it provides the basis to design a plan that might actually be accepted in collective bargaining, reflecting a coalition between the majority of players who will benefit from the increased bidding by more clubs, and those owners whose business strategy is to build the long-term strength of the sport.

Those interested in our National Pastime will welcome the Report's focus on competitive balance, recognition of the

²⁶ REPORT, *supra* note 6, at 39.

²⁷ Economic theory predicts that, all else being equal, payrolls will be cut with revenue sharing. Economists suggest that players are compensated based on their marginal revenue product (MRP)—the amount of additional revenue that will be generated by the player's addition to the roster. See, e.g., ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME 90-94* (1992). If local revenue from live gate and local broadcasts were shared so that each team only retained 50 percent of its revenue, then each player's MRP would be consequently reduced by 50 percent. See Andrew Zimbalist, *Competitive Balance and Labor Relations in Major League Baseball*, MILKEN INST. REV., First Quarter 2001, at 1, 12 [hereinafter *Competitive Balance*].

Although this insight needs to be considered in designing a plan combining revenue sharing and mandatory payroll minima, it should not be overstated. The simple version of the analysis summarized above would suggest that there would be minimal bidding for players in the National Football League, where almost all revenues are shared. Moreover, sharing revenues in a manner that rewarded success (for example, by sharing each team's broadcast revenue *per game* on a 50-50 basis with the visiting team) would minimize the salary-depressing effect of revenue sharing.

Another means by which team incentives to spend money on higher-quality players would not be diminished despite revenue sharing would be if a significant portion of revenue was awarded as a prize for performance. For example, MLB could require each team to put 50 percent of local revenues into a pool, that would be distributed, with 25 percent going to the World Series Champion, 15 percent to the runner-up, etc. This would tend to equalize the incentives between large and small market teams. See Stefan Szymanski, *Competitive Balance and Income Redistribution in Team Sports* (forthcoming 2002) (on file with author).

unfairness in the current distribution of local revenues, and insight that a well-designed plan can improve competitive balance without restricting overall compensation for players. Perhaps the most important contribution, however, only will occur if we take seriously a rhetorical flourish in the first sentence of the Report. The drafters style themselves as "representing the interests of baseball fans." They assert that "the long term interests of the fans are paramount."²⁸ The level of intelligent discussion about the interests of fans is traditionally low—most fans have such a strong identification with their favorite team that the result is incoherent and hypocritical (such as Dodger fans who decry free agency while preferring Kirk Gibson to Duke Snider or Willie Davis as their all-time favorite center-fielder). If those concerned about the public interest in our National Pastime seriously consider the Report, the result will be a growing awareness of how various ideas that are offered to benefit owners, players, or specific clubs will indeed affect the public interest. Especially with the erosion of the fiction that the Commissioner acts as a force independent of owners to protect fans' interests, this public awareness is essential.

II. SHORTCOMINGS

The Blue Ribbon Panel's Report was obviously and properly designed for consumption by those in the baseball industry and the general public, not as an academic article. Still, the intellectual heft and background of the drafters²⁹ creates a legitimate expectation that the Report's specific recommendations will be supported by rigorous analysis. Unfortunately, the Report comes up somewhat short in this respect. Most importantly, the Report's recommendations are almost entirely keyed to the drafters' conclusion that restoring a 2:1 ratio of payroll expenditure between the highest and lowest quartiles of teams is essential to promoting competitive balance, yet the Report fails to coherently explain why that ratio is so important. Another major shortcoming is evident when the Report's six recommendations are considered as a whole—it appears that the drafters have attempted to straddle, in a biased way, their desire to offer their

²⁸ REPORT, *supra* note 6, at 13.

²⁹ In addition to the general reputation for intelligent work deservedly held by Senator Mitchell and George Will, Richard Levin has a doctorate in economics from Yale and Paul Volcker's background includes a masters in political economy from Harvard and graduate work at the London School of Economics. See REPORT, *supra* note 6, at 55-57.

independent views on what would be best for baseball with a desire to offer suggestions that are politically palatable to important constituent groups. Third, although the drafters are self-proclaimed advocates of the interests of baseball fans, their Report exacerbates without meaningfully addressing the serious general exploitation of fans and taxpayers through tax subsidies. Finally, it is somewhat disappointing that a panel of economically-sophisticated experts would simply regurgitate, without serious analysis, the myth that fans forced to pay high ticket prices should blame higher player salaries for their concerns.

A. *Why Does a 2:1 Payroll Disparity Between Top
And Bottom Teams Promote Acceptable
Balance But a 3:1 Ratio Does Not?*

Through graphs and well-written narrative, the Report seeks to demonstrate a significant reduction in competitive balance after the 1994-95 strike. The data presented seems to confirm the drafters' conclusion that a significant number of teams do not have the regularly recurring reasonable hope of reaching post-season play that is important for the viability of these franchises and the overall health of the game.³⁰ Yet the Report's specific recommendations are tied to the stated goal of returning to a distribution of payroll expenses such that the average expenses of the top quartile of teams is no more than twice the average expenses of the bottom quartile. Unfortunately, the Report does not rigorously examine why a return to this pre-1994 ratio achieves the end goal of maximizing the number of clubs with a RRRRPP. Specifically, the Report fails to answer this critical question: why does a 2:1 ratio promote acceptable balance, but a 3:1 ratio does not? Certainly, someone approaching this question with a fresh mind might wonder how baseball was able to sustain competitive balance with a persistent payroll disparity of 2:1 in the first place. The success that baseball enjoyed as a balanced competition despite this persistent imbalance in the two decades following free

³⁰ It is important to acknowledge the point without overstating it. Fan welfare is probably maximized when most clubs have a RRRRPP. For example, between 1950 and 1965—when the New York Yankees won eight World Series and thirteen American League pennants, see THE BASEBALL ENCYCLOPEDIA, *supra* note 1, at 2889-2904—attendance grew by less than 3 percent, although real ticket prices remained virtually flat and real disposable income grew by 74 percent. See *Competitive Balance*, *supra* note 27, at 3. History demonstrates, however, that many franchises maintained at least minimal viability while going for long periods of time without a RRRRPP. Symposium panelists cited the Philadelphia Athletics and Washington Senators as examples.

agency suggests something more complex than the truism of labor economics that relative size of payrolls is crucial to competitive balance. Moreover, there is some evidence that the Report's focus on the 1996-99 seasons may not present an accurate picture of the opportunities for low-payroll teams, in light of some of the achievements by such teams in 2000 and 2001. Answers to these questions are critical to an evaluation of any specific structural changes proposed for baseball. The Report establishes competitive balance as its goal and then, without careful examination, makes a particular level of payroll disparity the proxy for competitive balance.

There are a number of unexplored alternative answers to this question, but these varied answers call for different policy solutions. Back in 1992, economist Andrew Zimbalist observed that payroll did not correlate well with performance: i.e., that teams often spent money unwisely so that high payroll teams did not succeed and low payroll teams did.³¹ Similarly, economist Stefan Szymanski has observed that the pay-performance correlation is significantly lower in baseball than it is in English soccer.³² One possible explanation for the post-'94 decline in competitive balance is that baseball executives' ability to pay for real rather than misperceived talent has improved.³³ If that is the case, restoring a 2:1 payroll ratio will not be sufficient, and the Report's recommendations will not achieve their desired goal.

Another possibility is that there is a minimum viable scale necessary to have a RRRRPP. Player personnel matters are an inexact science, and a club's on-field success is a function not only of the individual talent of the players but also coaching, "team chemistry,"³⁴ the avoidance of injury, and simply luck. Thus, whether a club's on-field performance will result in post-season play is the function of a variety of factors so that, at most, any given team has only a probability of post-season success. Perhaps the resulting probability function decreases as payroll goes down but disappears if payroll goes down too far. If this was true, then what is critical is not the ratio between the highest and lowest

³¹ See ZIMBALIST, *supra* note 27, at 75-104.

³² See Stefan Szymanski, *A Market Test for Discrimination in the English Professional Soccer Leagues*, 108 J. POL. ECON. 590 (2000).

³³ The statistical correlation between pay and team performance was never significant prior to 1995, but is statistically significant to the 1 percent level since then. Andrew Zimbalist, *Twins Shouldn't Be Exhibit A for Inaction*, SPORTS BUS. J., June 11-17, 2001, at 46.

³⁴ In this regard, current research suggests that teams with excessive intra-club payroll disparity may perform worse on the field. See Lawrence DeBrock et. al, *Pay and Performance: The Impact of Salary Distribution on Firm Level Outcomes in Baseball* (unpublished manuscript, on file with author).

quartile of clubs but rather ensuring that the lowest quartile's expenditures are simply higher. Such a conclusion would suggest that the Report's recommendations for increasing the payrolls of the bottom teams are on the mark, but those directing at constraining the top teams are unnecessary.

As the drafters correctly observe, the evidence does not support the conclusion that higher payrolls equal team success, as any Dodger or Oriole fan can attest. The Report states that "a high payroll does not automatically guarantee a good win-loss record and a contending season, but a low payroll usually means that a clubs cannot contend for a postseason berth or a championship."³⁵ Another explanation of why clubs with a low payroll could contend where the ratio between their payrolls and the most spendthrift clubs was 2:1, but not 3:1, is that the margin of error is such that post-season success is going to be limited to those with high payrolls. If this explanation was demonstrably true, then a significant limitation on high-payroll teams becomes appropriate. As detailed in Part III, though, such a limitation should be targeted to teams with both high payrolls *and* success; there is no legitimate reason to restrain high payroll under-achievers.

B. *What Are The Causes Of Increased Payroll Disparity?*

The Report is also unsatisfying in that it fails to explain what might have caused the payroll disparity to increase from 2:1 to 3:1 in the period since the strike. Formulating a response consistent with the goal of permitting RRRRPP for "well-managed club[s],"³⁶ the Report seems to accept the conventional wisdom that competitive imbalance is inevitable in an unrestrained market because the large-market clubs will systematically have greater revenues than small-market teams, creating a vicious cycle permitting big-city clubs to spend more, thus obtaining yet-greater revenues, while the small-market teams can spend less, preventing them from obtaining revenues necessary to improve. Focusing on local media rights as a source of imbalance, the Report notes that "[n]o matter how well-managed a club might be, it cannot change its media market rank."³⁷ However, there is only a modest correlation between media market rank and local revenues, with Atlanta, Denver, and Phoenix in the top six and Detroit and

³⁵ REPORT, *supra* note 6, at 29.

³⁶ *Id.* at 13.

³⁷ *Id.* at 19.

Montreal in the bottom quartile.³⁸ And it has been previously established that, while winning and market size both positively correlate to attendance, the elasticity of demand for wins varies from market to market and across time.³⁹ As a result, clubs in smaller markets with fickle fans have a greater incentive to increase payroll than clubs in larger markets with fans who may enjoy the amenities of the ball park regardless of on-field talent. Thus, it is not simply inevitable that large market teams will prevail.⁴⁰

Symposium panelist Eugene Orza, the players' union counsel, suggested that the 1994-95 strike caused greater economic harm to the financially weaker clubs than to the wealthier ones, and that this may have caused a short-term cycle that saw wealthy teams able to increase payroll, and attract fans back to the ballpark, while poorer teams had a much more difficult time with this process. If Orza is correct, the necessary policy response is some sort of short-term measure to jump-start the poorer teams back into a cycle where they can have a RRRRPP, and thus prosper financially, so that they have the means to invest in player talent, rather than to implement permanent structural reforms of the sort recommended in the Report.

The Report does not appear to consider the possibility that the weak correlation between market size and local revenues suggests that some of the clubs are "poor" because they are not innovatively managed.⁴¹ To be sure, the drafters fudge this issue by establishing a goal of ensuring that a "well-run" club has a RRRRPP. But a report that states that long-term competitive balance is essential for baseball, and claims to speak for baseball

³⁸ Assigning half the population size to each club in metropolitan areas with two clubs, the statistical correlation between media market rank and local revenues based on Report data is .58.

³⁹ See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 563-64 (1997).

⁴⁰ The Report's erroneous view that competitive imbalance is largely a function of the different media markets in which clubs operate may be due to the drafters' demonstrably incorrect assertion that in a free market, clubs would be clustered in a few large markets. See REPORT, *supra* note 6, at 5. As competition in virtually every professional soccer league in Europe (where clubs do not have territorial rights) demonstrates, large markets do attract multiple teams but face significant competition from clubs from smaller cities. Indeed, anecdotal evidence from England suggests that the largest markets are at a disadvantage. Six major league clubs compete for the patronage of London's fans. The dominant club in England is Manchester United, due in part to the fact that for a number of years its one cross-town rival (Manchester City) fell out of the major league for a variety of reasons.

⁴¹ The Report notes that Colorado is the tenth wealthiest club while a pre-expansion analysis suggested that the Denver area was the weakest of proposed sites for relocation. See REPORT, *supra* note 6, at 81-82; Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 758 (1989).

fans, surely falls short of the mark if it ignores a significant minority of fans who must suffer with no hope of success "next year" because of inept management.

C. *Is The Report's Revenue Sharing Proposal
The Most Effective Solution?*

Although the Report's revenue sharing proposal has much to support it, the radical increase in shared revenue raises some complex problems that authors of this stature should have discussed. As noted above, the proposal to share 50 percent of all local revenue can be justified both on grounds of fairness and promotion of competitive balance. But there is also a countervailing unfairness as well as an overbreadth to the recommendation that the drafters do not consider. Although the barter of television rights described above is unfair, this unfair system has been capitalized into the franchise values of teams, so that owners of franchises in larger markets pay significantly more than those in smaller markets. If the Report's revenue sharing recommendations were accepted, there would be an immediate windfall capital gain to small market teams and windfall loss to large market teams. The Report does not discuss how to deal with this.⁴²

On the other hand, concerns about unfairness and windfall gains might be overstated. After all, despite widespread dissemination of the Report, the grant of authority to the Commissioner to unilaterally exercise his powers to improve competitive balance (which clearly contemplates more revenue sharing), and Commissioner Selig's proposal to the players' union that includes substantial revenue sharing,⁴³ a consortium of knowledgeable baseball executives were still willing to offer over \$700 million to purchase the Boston Red Sox,⁴⁴ presumably a team that would be adversely affected in the short-run by revenue sharing.

Moreover, if the primary goal of revenue sharing is to increase competitive balance rather than to establish a more equitable approach to broadcast rights, a targeted approach would have far

⁴² One possibility is to obtain an independent appraisal of franchise values and impose a "capital gains exit tax" on the owners of small market clubs, upon sale, that would be used to compensate the owners of large market clubs.

⁴³ See Phil Rogers, *Revenue Sharing Steps to the Plate; Involvement by Selig Seen as Positive Sign*, CHI. TRIB., Jan. 11, 2002, at Sports p.1.

⁴⁴ See Meg Vaillancourt & Gorgeon Edes, *Baseball OK's Red Sox Sale Henry Gets Team After Charities' Funding Boosted*, BOSTON GLOBE, Jan. 17, 2002, at Business A1.

less impact on the large market teams. How a radical increase in revenue sharing between the top quartile teams and the middle-tier clubs furthers competitive balance is not clear. Indeed, a baseball executive affiliated with a large-market club has observed that a scheme whereby the wealthiest teams shared revenue with the poorest teams would require only half the cost of the Report's proposal.⁴⁵

D. *Other Than Revenue Sharing, Why Are Almost All Solutions At The Expense Of Non-Owner Constituencies?*

Although the Report's unsatisfying analysis of the precise causes of increased imbalance may constitute its major shortcoming, in several other ways the Report damages the credibility of these respected drafters' claim to speak impartially for baseball fans. Whether their call for a punitive 50 percent tax on payrolls in excess of \$84 million (a figure exceeded by seven teams in 2001) is well-founded or not is a matter of legitimate debate, but it is clearly aspirational in that it is unlikely that the Major League Baseball Players Association would accept such a proposal in the upcoming collective bargaining talks. Yet, in several respects, the Report's astute observations about problems solvable by recommendations that burden owners are softened, seemingly to make them more palatable to other interest groups. Most flagrant is that the proposal for the poorer clubs to spend more money is precatory rather than mandatory, and set only at \$40 million. The \$40 million figure is apparently derived from the somewhat arbitrary selection of \$84 million as the payroll ceiling and the desire to restore a 2:1 ratio between the highest and lowest quartile of teams. But it is not clear that, even with a 50 percent tax, top teams' payrolls will not exceed \$84 million, nor is it clear (as discussed above) that simply restoring this ratio will accomplish the Report's goals. Moreover, there appears to be absolutely no justification (and certainly no explanation in the Report) for why payroll minima should not be mandatory—other than the perception that some owners will find it unacceptable.

In a similar vein, the Report correctly observes that current rules permit the stockpiling of talented players in a way that facilitates competitive imbalance. However, the drafters' recommendations are limited to a significant expansion in the Rule

⁴⁵ In light of the Commissioner's edict that any discussion of matters relating to collective bargaining could result in a \$1 million fine, see Steve Henson, *Labor Daze*, L.A. TIMES, July 12, 2001, at D1, this not-for-attribution reference seems justified.

4 amateur draft in a manner which harms players but imposes few costs on owners, with only an extremely modest change in the Rule 5 minor league draft that simply allows selected clubs to draft a minor leaguer and not place the player on their own twenty-five-man roster. The drafters do not explain how allowing the Expos to draft a player from Columbus (the Yankees' affiliate) and assign him to Ottawa (the Expos' affiliate) will meaningfully increase the Expos' chance of a RRRRPP. Although a fuller and more satisfying report may have explained this, the Report's credibility is damaged when its solutions seem to be trimmed to primarily affect interest groups other than owners.⁴⁶

E. *Does The Report Speak For Fans Concerning
Ticket Prices And Stadium Subsidies?*

Although the drafters' focus on improving competitive balance is consistent with fans' preference for balanced seasons, the drafters' credibility as advocates of baseball fans is most severely tested in their treatment of fans as consumers. On the one hand, the Report perpetuates the myth that the escalation in ticket prices is caused by high salaries.⁴⁷ Although this conclusion is misguided, at least it shows a concern for fans. Particularly disconcerting, then, is the Report's brief and off-hand suggestion that baseball clubs be permitted to relocate when taxpayers will not provide sufficient subsidies for construction of new stadia.⁴⁸ A Report that seeks to credibly reflect fans' concerns need to grapple with ways that needed stadium construction can be financed on a more equitable basis.⁴⁹

High salaries do *not* cause high ticket prices; it is high ticket prices that permit owners to pay high salaries. Although the need to generate revenues to support a competitive team may explain

⁴⁶ For a more detailed discussion of the Rule 5 draft, see *infra* text accompanying notes 71-74.

⁴⁷ REPORT, *supra* note 6, at 11.

⁴⁸ See *id.* at 43.

⁴⁹ For a comprehensive list of these subsidies, see Raymond J. Keating, *You're Out! Corporate Welfare for Major League Baseball*, 91 TAX NOTES 1739, 1739-1751 (2001). The absence of any commentary in the Report on federal proposals to limit tax subsidies for wealthy owners speaks volumes. Cf., e.g., Katherine C. Leone, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 509-10 (1997) (discussing Stop Tax-Exempt Arena Debt Issuance Act, S. 1880, 104th Cong. (1996)); Team Relocation Taxpayer Protection Act of 1996, S. 1529, 104th Cong. (1996); see also PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 263-77 (2000) (advocating federal intervention to prevent stadium exploitation of taxpayers).

the need for new stadia that permit revenue-generating luxury boxes and corporate suites, the ticket prices charged for ordinary seats is entirely a function of consumer demand for those seats. Most games are not sell-outs; owners choose a revenue-maximizing ticket price based on market demand. If payroll were cut in half tomorrow, it is not clear why an owner would cut ticket prices; conversely, if payroll were to increase by 50 percent tomorrow, owners would not be able to make up the revenue by raising ticket prices—if they could raise ticket prices without losing revenue, they already would have done so.⁵⁰ Higher salaries can cause higher ticket prices in one particular respect, but this is one consistent with the interests of baseball fans. To the extent that a club's investment in a higher payroll results in a demonstrably improved club, consumer demand for tickets is likely to increase, which would allow clubs to increase prices.⁵¹

Because a serious examination of the causes of the escalation of ticket prices in baseball was apparently beyond the scope of the Report, a full and original examination is likewise beyond the scope of this Commentary. However, a few observations—perhaps as an agenda for future study—are in order. Prices for the most desirable tickets may reflect the combination of the increased popularity and increased affluence of baseball fans, combined with the increased marketing of season tickets to corporations to distribute for business purposes. Higher salaries may be an indirect cause of spurring baseball owners to hire front-office talent better able to exploit the considerable surplus that consumers previously enjoyed in the form of low ticket prices. The explanation for the increase, even in the “Bob Uecker” seats, must, however, be explained by increased demand.

Despite the important contribution that the Blue Ribbon Report makes to the ongoing discussion about contemporary issues in baseball, the Report leaves students and consumers of the National Pastime unfulfilled in several important respects. The Report fails to analyze convincingly why narrowing the payroll disparity between the top and bottom quartiles of teams to a 2:1 ratio is the magic elixir for competitive balance. The Report's

⁵⁰ In the decade following the introduction of free agency in baseball in 1976, average salaries rose from \$50,000 to \$400,000, while the inflation-controlled price of a baseball ticket actually declined. See WEILER, *supra* note 49, at 173. The owners were still making money due to the substantial growth in attendance and related live gate revenues, national and local broadcast revenues, merchandising, etc. See *id.*

⁵¹ Cf. Red Smith, *The Prophet of Doom Is Heard Again*, N.Y. TIMES, Dec. 14, 1980, at E3 (describing how Phillies immediately recouped \$800,000 salary paid to Pete Rose through an equivalent increase in advertising rates and a significant increase in season ticket sales).

recommendations puzzle the reader as to whether the distinguished drafters are proposing what they think best for baseball, regardless of its likely popularity, or are seeking, like mediators, to forward proposals that might not offend key interest groups. The Report encourages, rather than seeks to find a solution for, the practice more prominent in other leagues of franchise relocation to obtain publicly-financed stadia. Finally, the drafters damage their credibility by rehearsing the myth that player salaries need to be controlled for the sake of reasonable prices for families to attend baseball games.

On balance, though, the Report remains a positive contribution. The proposals provide the springboard for alternative suggestions for reform that may achieve the goals defined by the Report and may prove acceptable to interest groups. Some of these are considered below.

III. SOME PRACTICAL SUGGESTIONS TO IMPROVE COMPETITIVE BALANCE⁵²

Whatever the shortcomings of the Blue Ribbon Panel report, its goal of structuring the economic incentives in baseball so that each club has a regularly recurring reasonable hope or reaching post-season play (RRRRPP) is an admirable one. In this Part, this Commentary offers five specific suggestions of reforms designed to improve competitive balance. Major League Baseball should:

- 1) permit cash sales of players where the sale will promote competitive balance;
- 2) impose a mandatory minimum payroll for almost all major league clubs;

⁵² Although none of the proposals discussed in this Part are without controversy, as a package all are plausible candidates for attracting sufficient support within the baseball industry to be implemented. In a forthcoming article with Professor Stefan Szymanski, I propose another more radical solution designed to maximize the competitive balance interests of *most* fans. See Stephen F. Ross & Stefan Szymanski, *Open Competition in League Sports*, 2002 WISC. L. REV. 625; see also Stefan Szymanski & Stephen F. Ross, *Open Competition in League Sports* (Soc. Sci. Res. Network, Working Paper 2000), available at http://papers.ssrn.com/paper.taf?abstract_id=243756. We suggest that Congress or the courts require Major League Baseball to re-structure to permit new clubs to join junior leagues, with the top finishers each year being promoted to the major leagues and the worst teams in the majors being relegated to the junior leagues. Such a proposal would increase competitive balance by providing a strong incentive for non-contenders to increase their payrolls to avoid relegation. Moreover, to the extent that certain teams are always dominant due to their exclusive or semi-exclusive rights to play in a major media market, our proposal will break down this power by permitting new teams to enter (e.g., in Brooklyn, New Jersey, the San Fernando Valley, etc.).

- 3) restrain the ability of clubs with *both* extraordinarily high payrolls *and* championship records to improve their club by additional free agent acquisitions;
- 4) significantly expand the ability of weaker clubs to select minor league players from stronger clubs through the Rule 5 draft; and
- 5) institute procedures to deter habitually inept management of local franchises.

This Part explains why these proposals will achieve the Report's goal of improved competitive balance and why the impact that these proposals would have on important constituents of the baseball industry suggests that a consensus could potentially⁵³ emerge around them.

1. Cash Sales

One of the significant imperfections in baseball's labor market is the fact that the rights to most players' services can be assigned to another team only through barter—a "trade" for other players—rather than for purely monetary considerations. This custom, generally followed in the other major North American sports, is a temporal and geographic anomaly. Prior to World War II, the then-exclusive and perpetual right to a baseball player's services was frequently sold for cash (most famously in the case of Babe Ruth, sold by Red Sox owner Harry Frazee for cash needed to finance a Broadway play).⁵⁴ In the principal international professional sport—soccer—clubs pay enormous "transfer fees" to secure the rights of top players.⁵⁵ Indeed, although European players now enjoy even more generous free agency rights than their North American counterparts following a 1995 court ruling,⁵⁶

⁵³ An outside academic, unfamiliar with important facts such as confidential collective bargaining, in the context of an industry where decisions are made by strong personalities that occasionally behave contrary to rational self-interest, would never predict that proposals would in fact be adopted.

⁵⁴ Mal Florence, *Morning Briefing: Boston Will Never Forget*, L.A. TIMES, Jan. 3, 2001, at D2 ("On this day in 1920, Boston Red Sox owner Harry Frazee sold pitcher-outfielder Babe Ruth to the New York Yankees for \$125,000 plus a \$350,000 loan. The loan was used to fund the Broadway musical "No, No, Nanette," which became a hit."). Professor Paul Weiler, befitting the politeness of his native Canada, notes that Frazee was motivated by the desire to provide an artistic outlet for his "lady friend." WEILER, *supra* note 49, at 175.

⁵⁵ See, e.g., John Ley, *Zidane in £48m Real Deal*, THE DAILY TELEGRAPH (London), July 10, 2001, at 8 (discussing Real Madrid's payment of transfer fee for French international star Zinedine Zidane and Manchester United's £28.5 million payment to the Italian club Lazio for star Juan Sebastian Veron).

⁵⁶ See *Union Royale Belge des Societes de Football Assoc. ASBL v. Bosman*, [1996]

players are rarely signed as free agents. Rather, the custom has emerged that a club skeptical of its ability to re-sign one of its players will sell the player with at least a year remaining on his existing contract, thereby pocketing a sizable transfer fee.⁵⁷

Cash sales in Major League Baseball gradually disappeared after World War II, but no formal rule was developed until the celebrated case of *Charles O. Finley & Co., Inc. v. Kuhn*.⁵⁸ Charles O. Finley, the irascible owner of the Oakland A's, had benefited enormously from the reserve clause since he was both extremely cheap (paying his players even less than other owners in a monopsonized market) and a difficult owner with whom to deal. He understood that star players would be highly unlikely to remain with the team if given a choice, and so he agreed to sell three stars to the Boston Red Sox and New York Yankees in the middle of the season, just before free agency was to go into effect. Commissioner Bowie Kuhn exercised his powers to veto the assignments as contrary to the best interests of baseball.

Whether most clubs have read that decision broadly to ban cash sales or not, the fact remains that today there are virtually no assignments of top-quality players in return for cash. Commissioner Kuhn seemed concerned that cash sales would hurt competitive balance, by permitting wealthier teams to buy the good players from poorer teams. In reality, however, cash sales can potentially benefit the less financially secure teams and promote the goals set for in the Blue Ribbon Panel's Report. The Rule 4 amateur draft gives less wealthy teams the opportunity to develop talented young players on a fairly equal basis,⁵⁹ but recent

CEC (CCH) 38 (Dec. 15, 1995).

⁵⁷ See, e.g., Gary Ward, *Beckham Must Wait*, NEWS OF THE WORLD, May 13, 2001 (reporting that if Manchester United cannot sign star midfielder to contract extension, the club will sell him because "United dare not risk allowing his contract to expire in 2003 and let him have a free transfer.").

⁵⁸ 569 F.2d 527 (7th Cir. 1978) (upholding power of commissioner). For a discussion of the case, see ROGER I. ABRAMS, LEGAL BASES: BASEBALL AND THE LAW 109-14 (1998).

⁵⁹ The Report correctly notes that recently, shrewdly-advised amateurs have been able to credibly threaten to exercise their options to of attend college, remain in college, or play for an independent baseball league in order to increase their compensation, resulting not only in huge signing bonuses but also in inferior clubs with the highest draft picks passing over the best players to choose players they are more confident of signing within their budget constraint. See REPORT, *supra* note 6, at 41. Some of the solutions proposed by the drafters—such as requiring college players to give up their eligibility in order to be considered by a professional team, and providing semi-permanent exclusive negotiating rights for the team that initially drafts an amateur—seem unnecessarily monopsonistic.

Certainly the Report's proposal to allow clubs to sell or trade their draft rights, to eliminate compensatory draft picks for teams losing free agents, and to eliminate first-round draft picks for playoff teams, helps assure that the tailored, pro-balancing design of the draft works as intended. Another non-monopsonistic reform would be to provide that clubs unable to sign a high draft pick simply get an additional draft pick the following year.

history is replete with examples of teams with outstanding farm systems and great young players losing all of them, with virtually nothing to show for their efforts. Imagine how a Pittsburgh Pirate club faced with losing Barry Bonds, Andy Van Slyke, Doug Drabek, and others might have maintained their ability to have a RRRRPP if they could have sold the rights to two of their stars after their fifth year in baseball, thus providing the funds to keep one of the stars and continue to rebuild!

The ability of a less wealthy team to sell players for cash is qualitatively distinct from the current practice whereby teams out of contention for post-season play will, in late July, trade their veteran players whose contracts are about to expire for low-priced minor league talent.⁶⁰ In these cases, the trading team is often primarily interested in saving the veteran's salary over the remainder of the season. While some minor league prospects may ultimately lift a losing team back into contention, there can be little doubt that short-term competitive balance would be enhanced by affording these lesser teams the opportunity to get cash. Of course, lifting a ban on cash sales would not preclude a clever general manager from trading for minor leaguers whose long-term value is greater than cash.

Off-season cash sales will not only improve competitive balance by providing revenue assistance and a fair reward for poorer teams with excellent farm systems; it also will promote balance by giving mid-tier teams the means to compete more

Competitive balance would also be enhanced by giving weaker teams more draft picks in early rounds.

The Report proposes to subject foreign players to the Rule 4 draft without serious consideration of the effects on player development. The Report expresses concern about developing the game domestically as well as internationally, but fails to acknowledge that the ability to reap the benefit of signing a young star is what creates the economic incentive for clubs to invest in player development in those areas where local schools or clubs are not up to the task. See REPORT, *supra* note 6, at 45. A draft may potentially improve competitive balance when the effect is to give weaker teams the initial rights to recognized high school and college stars in North America. Perhaps the extension of the draft to cover Mexican or Japanese players, who would presumably be selected after demonstrating their skills in their country's organized leagues, might have a similar impact. Applying the draft to Dominican players, however, raises other complex issues, similar to those involved with re-invigorating development of baseball in America's inner cities. Unfortunately, the Report failed to consider alternatives such as maintaining draft-free zones with baseball academies, but requiring that these academies be reorganized as joint ventures with poorer clubs, or by providing that clubs that maintain baseball academies in poverty-stricken areas without an established baseball infrastructure retain exclusive rights to players subject to being selected in the first two or three rounds of the Rule 4 draft.

⁶⁰ See, e.g., Bill Plaschke, *Arms Race: Those Giant Measures Expose a Fundamental L.A. Problem*, L.A. TIMES, July 31, 2001, at D1 (describing trade of starting pitcher James Baldwin from White Sox to Dodgers for three mediocre minor leaguers).

effectively against a dominant team. Consider the strategic options that now face a good team that might finish seven to ten games out, who might decide that with one additional quality starting pitcher and a great lead-off hitter, they could seriously compete for the championship. If, fortuitously, this club had surplus talent in other areas, then they could consummate a trade to fill their needs. Usually this would not be the case, and a trade will simply result in filling one need while creating another. The other option now available for such a team is to acquire a starting pitcher and a great lead-off hitter in the free agent market. The difficulty, especially for a team with a smaller revenue base, is that there are very few top quality starting pitchers or lead-off hitters that happen to be free agents in any given year. So the bidding for these players can be prohibitive. On the other hand, if cash sales were permitted, this team can look not only to the free agent market but also every team in baseball for that quality player, probably find such a player for a more reasonable price, and improve their roster.⁶¹

One of the most important insights of the Batter Up! Symposium was the view expressed by Major League Baseball General Counsel Thomas Ostertag about the Commissioner's decision challenged in *Kuhn*.⁶² In Ostertag's view, this was a very limited decision, based on the Commissioner's view that the specific transaction was part of a scheme by Finley to decimate the team and pocket the money.⁶³ Ostertag suggested that this ruling would not necessarily preclude a cash sale under the two scenarios outlined above. This is welcome news indeed.

As noted above, recent changes in the MLB Constitution specifically define the best interests of baseball to include the

⁶¹ Any change in this custom would arguably relate sufficiently closely to wages and working conditions that it would constitute a mandatory subject of bargaining with the players' union. See *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1061-62 (2d Cir. 1995) (upholding NLRB determination suggesting that virtually anything that relates to free agency and competition for player services is a mandatory subject of bargaining). To assure union approval, this Commentary assumes that the players' consent would be required for junior players. This is unlikely to be a significant obstacle. In Europe, and most certainly here if implemented, the cash sale will occur simultaneously with a new long-term contract with the buying club. For veteran free agents, the right to assign for cash would simply be subject to any no-trade clause that the player currently negotiates.

⁶² 569 F.2d 527 (7th Cir. 1978). The reported decision by the Seventh Circuit Court of Appeals deals with the distinct legal question concerning the scope of the Commissioner's power. The focus of the text here is on the Commissioner's underlying decision that the cash sales were detrimental to the best interests of baseball.

⁶³ See, e.g., MILLER, *supra* note 9, at 377 (unfavorably contrasting Finley's acts with those of Philadelphia A's manager-owner Connie Mack, who sold champion teams in 1914 and during the 1930s to allow himself to stay in baseball).

public perception that “there is an appropriate level of long-term competitive balance among the clubs.”⁶⁴ In this light, the Commissioner should clarify the issue by specifically stating that the *Finley* decision will only be invoked hereinafter to preclude those sales where the Commissioner determines, on the facts of the case, that the effect of the particular sale will be harmful to competitive balance. Specifically, the Commissioner should indicate that he will approve cash sales where (1) the selling club is unlikely to be able to sign the player to a long-term contract, and has demonstrated that it will reinvest the proceeds of the sale in higher payroll; (2) the sale transfers the rights to the player from a winning club to a losing club; or (3) the sale is from a losing club to a winning club but the Commissioner is satisfied that (a) the losing club will reinvest the proceeds of the sale to improve itself and (b) the winning club’s acquisition of the player will increase competition against more dominant rivals.

2. Mandatory Salary Minima

Although the Report fails to provide precisely the causal link between payroll disparity and competitive balance, it certainly seems sensible to target the low payrolls maintained by a number of clubs as a cause of their inability to have a RRRRPP. Yet the Report fails to precisely explain why \$40 million is the appropriate target for the minimum payroll necessary to compete viably. Even more significantly, although the drafters state that “*it is imperative that enhanced revenue sharing be coupled with an appropriate minimum club payroll*,”⁶⁵ the Report does not explain why a variety of revenue sharing schemes should be used simply to “encourage” these minima. It would seem that the Report’s goals could be better achieved by a more careful examination to calculate the expected minimum payroll necessary to viably compete, and then to require clubs to maintain such a payroll.

To permit flexibility in allowing a club to develop its team in the most efficient way, and to make the rule consistent with the goal of a “recurring” possibility of post-season play—rather than the need to have every team viably compete every year—under this proposal clubs should meet a specified minimum over a rolling three-year period. Thus, a club could spend less because of an extraordinary number of younger talented players on the team,

⁶⁴ MLB CONST., art. II, § 4.

⁶⁵ REPORT, *supra* note 6, at 38.

with the expectation that the average would be achieved over several years through salary increases and the acquisition of veteran free agents when their contribution is more likely to result in post-season play.

Every baseball franchise is located in a major metropolitan area, so that a well-run team should generate sufficient local revenue that, when combined with shared revenue, would permit the team to viably maintain a minimum payroll of at least \$40 million. It is conceivable that a team purchased on speculation of continuously rising franchise values, combined with prior mismanagement, might find itself unable to service a \$40 million payroll and the debt service used in the franchise's acquisition. If so, the victims should not be local fans but the owners who brought such mismanagement on themselves. If necessary, they should be required to sell at a capital loss to an owner who can guarantee that a minimum payroll can be maintained. Alternatively, creative financial techniques—including government investment in return for equity or creation of special classes of stock for fans—should be used to provide sufficient capital to permit continued viability.

3. Tailored Rather Than Blanket Salary Restraints

The Report's proposal for a 50 percent tax on all payrolls exceeding \$84 million is quite problematic. As a practical matter, it is almost impossible to conceive of a scenario whereby the players' union would accept such a proposal any time in the near future. As an aspirational matter, the Report provides little evidence that the very richest and most successful teams—the ones whose domination causes the greatest threat to competitive balance—will be sufficiently deterred by the tax to limit their acquisition of player talent. If, indeed, a maximum payroll of \$84 million is essential for competitive balance, then it is not clear why the drafters did not propose a salary cap.

More fundamentally, the Report fails to accept that high payrolls are a highly imperfect proxy for competitive ability. High payroll teams—in recent seasons, most notably, the Los Angeles Dodgers and the Baltimore Orioles—have been very disappointing. Any “blanket” restraint like the one proposed by the Report's drafters that fails to distinguish between these two clubs and the New York Yankees and Atlanta Braves is simply misguided. Although the Report acknowledges that the current luxury tax does not meaningfully constrain the top teams, an

example under the current system illustrates the problem with blanket restraints. In 1996, the White Sox signed Indians' outfielder Albert Belle to a multi-year, \$55 million contract, resulting in a \$3.5 million tax.⁶⁶ Why the White Sox should have been discouraged from signing Belle (from the perspective of competitive balance, at least) is hard to discern. After all, the White Sox had suffered a loss in attendance in 1995, did not make the playoffs, and finished 14 games behind the Cleveland Indians. Signing one of the Indians' star players would seem to promote, rather than hinder, competitive balance and thus should be encouraged, not discouraged (unless the only consumers whose welfare one is seeking to maximize are Indian fans!).

An alternative would be what tax lawyers might call a "progressive salary cap." Such a cap would operate differently for each team, depending on its record during the previous season, with a "tight fitting" cap on the top handful of teams, a more relaxed limitation on contenders, and no salary limitation on clubs whose season ended before the opening of the Supreme Court's annual term. One example of this type of scheme is the so-called "Rooney Rule," which under the NFL's current collective bargaining agreement comes into play if a salary cap is not in effect.⁶⁷ Under this rule, the top eight teams are limited in their ability to sign a greater number of veteran free agents than they lost from their own roster.⁶⁸ Unlike the salary caps in effect in the NBA and NFL, this rule *is* tailored to promote competitive balance. It restrains only those teams whose continued improvement would actually jeopardize such balance, without limiting franchises who, due to bad luck, poor personnel decisions, or other factors, have high payrolls but poor records.

This proposal not only has the virtue of restraining repetitive winners while allowing all other teams to improve but also has the potential of receiving player support. Intensely competitive professional baseball players—the majority of whom will never see the benefits of free agency—are bound to dislike a system where so many of them are consigned to clubs with no RRRRPP. Unlike a blanket restraint, a progressive restraint will each year limit only a small handful of clubs. Although it is conceivable that a few select free agents might receive top offers only from these teams, and thus would have their salaries significantly affected by a progressive restraint, the overwhelming majority of players would

⁶⁶ Claire Smith, *In Baseball, Reinsdorf Smiles Alone*, N.Y. TIMES, Nov. 21, 1996, at B17.

⁶⁷ This occurred only during the first year of the agreement, in 1994.

⁶⁸ See *White v. Nat'l Football League*, 822 F. Supp. 1389, 1413 (D. Minn. 1993).

see unconstrained offers from clubs with increased revenue and an increased chance at a championship.⁶⁹

To illustrate one possible version of this proposal, even accepting the \$84 million figure proposed by the Report, three of the seven teams exceeding that amount in 2001 did not appear in post-season play in 2000 and thus would not have been subject to a progressive salary restraint. To be sure, eliminating the Yankees, Mets, Indians, and Braves from last season's free agent market would have affected a few top stars, but the overall effect would not only have promoted the interests of fans generally by requiring these dominant teams to compete against improved rivals but, when combined with increased revenue sharing and the likely increased spending by others seeking to take advantage of the handicap imposed on these teams, would likely have increased aggregate player compensation as well. To the extent that baseball salaries are significantly affected by a "trickle down" from the top stars, it is noteworthy that of the eight players paid most highly in 2001, only two would have been on capped teams, demonstrating the ample ability of other teams to vigorously compete for the best talent.⁷⁰

4. Rule 5 Draft Changes

In 1954, the Brooklyn Dodgers lost Hall of Fame outfielder Roberto Clemente in the Rule 5 Draft. Clemente was initially assigned to the Dodgers' International League farm team in Montreal, because there was no room for him on the fabled 1955

⁶⁹ A generally unrestrained labor market is actually good for fans by promoting competitive balance, in that it allows inferior teams to quickly improve. Ross, *supra* note 39, at 567-77. Why it might be in fans' long-term interests for player salaries to be otherwise constrained remains perplexing. In a missive that parallels many of the Report's recommendations, a noted sports commentator asserts without serious explanation that "competitive integrity also rests on some form of upward limitation on players salaries." BOB COSTAS, *FAIR BALL: A FAN'S CASE FOR BASEBALL* 87 (2000). Costas suggests that, without these limits, competitive balance will be hurt by wild spending on superstars. *See id.* at 96. As with the Report's drafters, he fails to explain why wild spending harms competitive balance *unless it is conducted by teams dominant on the field as well as in a list of payroll expenditures*. It may well be that union members who play baseball, like most of their unionized counterparts in other industries, might choose to limit the salaries of the top workers in order to more equitably spread the money available for player compensation to others. This is an argument that Costas should direct to the MLBPA as a matter of internal union management, not as part of his self-described "fan's case for baseball."

⁷⁰ The eight were Alex Rodriguez (Texas), Manny Ramirez (Boston), Derek Jeter (New York Yankees), Jeff Bagwell (Houston), Carlos Delgado (Toronto), Roger Clemens (New York Yankees), Mike Hampton (Colorado), and Kevin Brown (Los Angeles). *See* Paul Sullivan, *Craving Star Bucks*, CHI. TRIB., Feb. 22, 2001, Sec. 4 at 1.

"Boys of Summer." As a result, the last-place Pittsburgh Pirates were able to claim him.⁷¹ Today, the Rule 5 draft is riddled with so many exemptions that the Dodgers would be able to protect Clemente for some time. First, each club is allowed to protect forty players from selection in the Rule 5 draft, rather than the twenty-five comprising the regular season roster. Second, unsigned free veteran agents whom the club fully intend to re-sign need not be included. As a result, close to twenty players who will not make a top club's twenty-five-man season roster, but who theoretically could make a real contribution to another major league club, are protected from the draft. Third, the club is also allowed to protect thirty-nine players on its AAA roster. As a result, someone who is perhaps the eightieth best player on a dominant team cannot be drafted unless a weaker club is willing to make the player one of their top twenty-five. Finally, there is an automatic exemption for players that cover their first two or three years of professional service. Although the latter exemption reflects legitimate interests,⁷² the combined effect of all these exemptions is to deprive the Rule 5 draft of its purposes of discouraging stockpiling and promoting competitive balance.

The problem with the Rule 5 draft is not, as the Report suggests, its stringent requirement that a drafted player be retained on the twenty-five-man roster or be returned to the player's initial club. Such a provision keeps the draft properly focused on its goal, which is to avoid stockpiling. The real problem is that wealthy and talented teams can stockpile players that are not contributing to the team. The rule should be re-designed with the goal that a player making a minimal contribution to a champion can appear in the line-up, rotation, or a key spot in the bullpen of an inferior team. First, we should return to the half-century-old rule that allowed clubs to protect only the twenty-five players on their in-season roster, including any veteran

⁷¹ Clemente was signed as an amateur by the Brooklyn Dodgers in 1954, and was deliberately played in only 87 minor league games for their farm team, the Montreal Royals of the Class AAA International League. He batted .247 for Montreal, and contributed a mere two home runs and 12 runs batted in. The Dodgers' major league roster for that year constituted the famed "Boys of Summer" who would win the 1955 World Series, and they left Clemente off the list. He was drafted for \$4,000 by the last-place Pittsburgh Pirates, for whom he started the following year (when they remained in the cellar). See *Trivia Quiz*, THE SPORTING NEWS, July 22, 1991, at S22; Don Reed, *Eye Openers*, ST. LOUIS POST-DISPATCH, Oct. 4, 1992, at 2F; THE BASEBALL ENCYCLOPEDIA 416, 420 (Joseph E. Reichler ed., 7th ed. 1988).

⁷² This exemption appears designed to protect the initial investment in player development. However, it has a potential for improving competitive balance as well. Absent such an exemption, a talented and rich team might be able to take a chance on drafting a young prospect clearly unready for major league ball from a weaker and poorer team who cannot afford a place on their major league roster for such a player.

free agent unless (like the NBA does) the club renounces any interest in re-signing the player. Second, to prevent dominant teams from storing a rising star on its bench for long-term use, clubs should be able to designate five to eight players as “rising stars” who would be further protected; however, the designating club should be able to option such a player down to its minor league club for only two years after an initial designation. Third, the minor league roster size for purposes of the Rule 5 draft should correspond to their usual operating size during the baseball season. Thus, only twenty-three players could be designated for the AAA roster. This would allow weaker teams to select players assigned to dominant clubs’ AA or A roster and retain them in their own minor league system for training and development.⁷³

The problem with the requirement that players be retained on the drafting team’s major league roster is not that this substantially deters inferior teams from selecting stockpiled players but rather that an inferior team might select a young, unready player with great potential and simply allow him to sit on their bench for several years rather than developing in the minor leagues.⁷⁴ There is no perfect solution to this problem, for there is no way to objectively distinguish between a stockpiled minor leaguer who can make a modest contribution on the bench of a non-contender, and an experienced future star grabbed by a cellar-dweller because a contending team can’t afford a roster space for him. The “rising star” exception suggested above reflects an effort to balance these competing considerations.

5. Replace Inept Management

As self-proclaimed advocates for baseball fans, the Report’s drafters properly seek to respond to fans’ desire to root for teams that have a real chance to contend for the championship, and where a season has been a disappointment in that regard, to have

⁷³ It is true, as Spencer Waller explained to me in insightful comments, that the Rule 5 draft is underused because it is rare that a team is so inferior that a player in someone else’s minors can be immediately useful on its own major league team, but that is only because of the asymmetry that requires the selection of someone else’s forty-first best player on a team’s top twenty-five. It should not be that unusual for a player who cannot make a contender’s major league roster to be able to contribute to one of the cellar-dwellers.

⁷⁴ A famous example of this phenomena concerned the 1950s rule that required clubs to keep on their major league roster any “bonus baby” who received a signing bonus over a specified amount. Thus, rather than receive close training and development, Sandy Koufax spent his first two years sitting on the bench for the two-time league champion Brooklyn Dodgers. See KOPPETT, *supra* note 2, at 237.

real hope for next year. Yet the Report limits itself to those reforms designed to allow "well-run" clubs to achieve a RRRRPP.⁷⁵ Other than trimming their sails to appeal to the owners who created their panel, it is not clear why their Report stops there. A team that has no hope of success harms local fans and the overall attractiveness of the sport just as much when that lack of success is due to inept management as when it is due to the economic structure of the league. There is no reason why the fans' interest in having each team have a RRRRPP should be frustrated by inept management. Major League Baseball would therefore demonstrate a real and credible interest in fans by instituting a policy of centralized review of teams who, in the wake of the other reforms designed to achieve competitive balance, repeatedly disappoint their fans.

Baseball requires such an extraordinary review process because usual market mechanisms are unavailable to protect the public. In most other industries where firms enjoy considerable market power, the firms are publicly traded corporations; inefficiently run corporations are subject to hostile takeovers by those who believe the firm's value would increase with new management. In contrast, many baseball clubs are either privately owned by individuals, closely held corporations, or partnerships; in such cases, there is no market means to replace an inept owner. Some clubs are publicly owned. However, a parent corporation's primary interest (especially when, as is the case with the Cubs, Dodgers, and Braves, the parent is a media company) may be in achieving goals other than reasonably recurring post-season success, so here too the market will respond only imperfectly to operational efficiency.

Commencing four years after the implementation of reform proposals, the Commissioner, acting under his powers to promote competitive balance, should initially appoint a special outside investigator for any franchise that has not appeared in post-season play at least once in the prior four years. This individual, with no current ties to baseball but with a background of credible expertise, should have access to all of the franchise's business records and to the complete cooperation of front-office personnel. The investigator should quickly report back to the Commissioner as to whether there are obvious and justifiable explanations for this persistent failure—injuries, slow but rapid improvement, narrow misses, etc. If no such explanations are readily apparent, the Commissioner should then create an Inquest Committee to

⁷⁵ REPORT, *supra* note 6, at 5.

fully investigate whether management failure has been the cause of the club's poor performance and to make specific recommendations. The Committee should include a representative of fellow owners and the Commissioner, or his designee. The club's owner would be required to respond to the Inquest report and to make undertakings, indicating the steps to be taken to remedy the situation. The Commissioner should provide the club's fans with an opportunity to express their views. In all likelihood (especially given a likely bias toward fellow owners), the Committee would accept the owner's undertakings and continue to monitor the club's progress.

However, if an owner's undertakings fail to achieve success, or appear to the committee to be unlikely to achieve them, the owner could be required to sell the franchise to more competent ownership. For example, an owner who has wasted millions of dollars with poor personnel decisions and then makes it clear that he is unwilling to further invest in player talent and scouting might be forced to sell following receipt of the Inquest report. Another owner who demonstrates an inability to select competent front office help, or to give baseball personnel the freedom to make sound decisions, might also be asked to step aside. On the other hand, owners with a credible plan to bring the team back to contention—even over a three to four year period—would be granted the leeway to do so. Finally, to protect maverick owners against arbitrary actions to expel them, as well as to protect baseball against costly and time-consuming litigation, any decision by the Committee to require a forced sale would be subject to binding arbitration.⁷⁶ Evidence that a club's ownership structure is subject to market forces, and there are market indicia that replacing current management would not increase the club's market value, would point strongly against the dramatic sanction of a forced sale.

CONCLUSION

Baseball Commissioner Bud Selig took a constructive step in creating a Blue Ribbon Panel on Baseball Economics, and the distinguished members of the Panel have rendered an important contribution to the ongoing discussion of our National Pastime. The recognition that this discussion needs to include thoughtful

⁷⁶ The arbitrator could also consider if the club's fate had been strategically sealed by other owners anxious to remove a maverick. Otherwise, teams could, for example, refuse to trade with an unpopular owner in the hopes of causing his expulsion.

advocacy on behalf of America's baseball fans itself makes the Panel worthwhile. The Report also makes an enormous contribution by focusing the discussion on ways to ensure that all clubs have a regularly recurring reasonable possibility of post-season play.

However, in several important respects, the Report is unsatisfying. Its reasoning lacks the rigor and comprehensiveness one might have expected from such an expert Panel. The report establishes payroll disparity as a proxy for competitive imbalance but fails to provide a detailed analysis of causality in light of a history of competitive balance despite disparity. Its recommendation that weak teams be *encouraged* to increase payrolls, while wealthy teams be *punished* for maintaining high payrolls, harms the Panel's credibility as disinterested observers and creates the appearance of bias in favor of owners.

Building on the Report, this Commentary suggests five concrete and plausibly acceptable proposals to improve competitive balance. Permitting cash sales of players subject to the Commissioner's oversight, establishing a mandatory minimum payroll at a level likely to permit clubs to viably contend for post-season play, imposing payroll maxima only on dominant teams, changing the Rule 5 "minor league draft" to limit the players on top teams that can be protected, and establishing procedures to reform or rid the industry of inept management, are all designed to give observers of the game the same "hope" for the future of our National Pastime that each fan perhaps will have, if these proposals are implemented, each springtime.